No. 14,968

United States
COURT OF APPEALS
for the Ninth Circuit

HARRY X. BERGMAN, PERMA-LOX ALUMINUM SHINGLE CORPORATION and VICTOR H. LANGVILLE, doing business under the assumed name of Langville Manufacturing Company,

Appellants-Petitioners,

vs.

ALUMINUM LOCK SHINGLE CORPORATION OF AMERICA,

Appellee-Respondent.

PETITION FOR REHEARING

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Appellants, Harry X. Bergman, Perma-Lox Aluminum Shingle Corporation and Victor H. Langville, petition this honorable Court to reconsider its opinion dated October 12, 1956 dismissing the appeal herein, and to decide the case on its merits.

The appeal was dismissed on the grounds that the decree appealed from did not contain any "express determination that there is no just reason for delay" or any "express direction for the entry of judgment" as

required by Rule 54(b) of the Federal Rules of Civil Procedure.

The basis for this petition is that this Court has jurisdiction under 28 USCA § 1292 (1) and (4).

POINT I

The decree is appealable under 28 USCA § 1292(1) as an order granting an injunction. Paragraph VI of the decree (Tr. 55-56) grants an injunction against all of the defendants, Bergman, Perma-Lox and Langville.

§ 1292 provides in part:

> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States . . . granting . . . injunctions . . ."

As far as the defendants, Bergman and Perma-Lox are concerned, less than all the claims between them and plaintiff have been adjudicated and it would appear that Rule 54(b) governed and the decree was not appealable because it did not contain the certificate of the District Court. However, as previously stated, 28 USCA § 1292(1) expressly makes an interlocutory order, like the present one, granting an injunction appealable.

Rule 54(b)) deals solely with finality of judgments and does not apply to interlocutory orders made appealable by statute. See Moore's Federal Practice, second edition (1953) Vol. 6, pages 232-234, and cases there cited.

In *Hook and Hook v. Ackerman,* 3 Cir. 1954, 213 F. 2d 122, the Third Circuit expressly adopted the rule as stated by Professor Moore in his treatise (supra) and specifically declined to follow the ruling of the Seventh Circuit in *Packard Motor Car v. Gem Mfg. Co.,* 7 Cir. 1950, 187 F. 2d 65, cert. granted 341 U.S. 930, dismissed by stipulation, 342 U.S. 802, which appears to be the only circuit to have adopted a view contrary to the one being urged on this Court.

POINT II

As to the defendant Langville, the decree, in addition to being appealable under 28 USCA § 1292(1), is also appealable under § 1292(4) as a decree which is final except for accounting.

The Complaint (Tr. 3) charged defendants Bergman and Perma-Lox with both patent infringement and unfair competition. Defendant Langville was charged *only with patent infringement.* Defendants Bergman and Perma-Lox answered (Tr. 10) denying infringement and counterclaimed for unfair competition. Defendant Langville separately answered the complaint (Tr. 24) denying infringement and validity of the plaintiff's patent *but did not counterclaim.* Defendant Langville appealed from the decree entered herein by the District Court (Tr. 56, 57). Therefore, as far as Langville is concerned, that judgment was final except for accounting and satisfies 28 USCA § 1292(4) and should entitle him to an appeal on the merits.

We believe that all of the defendants are entitled to a decision on the merits from the decree appealed from; however, a decision on the merits as to any one defendant will dispose of the case for all defendants because the issues of validity and infringement are identical for all defendants.

It should also be noted that the pretrial order entered by the District Court stated (Tr. 46):

> "This Order supersedes the pleadings as to the issues of fact and the issue of law between the parties segregated by this Order and will control the course of the trial except as provided in the Stipulation dated February 18, 1954, and shall not be amended except by Order of the Court to prevent manifest injustice."

The only issues of fact and law raised by the pretrial order related to validity and infringement of plaintiff's patent. These issues were finally disposed of except for accounting in the decree appealed from.

The final paragraphs of the decree quoted by this Court in its opinion further emphasize that it was the intention of the District Court to enter a decree which was final and appealable on the questions of validity and infringement and reserved jurisdiction only on the unadjudicated issues (unfair competition).

In view of the state of the law as expressed by the courts of appeals which have considered this question defendants had to appeal from the decree entered herein since Rule 73(a) provides:

> "When an appeal is permitted by law from a district court to a court of appeals the time within

which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law . . ."

We submit that an appeal from the decree of the District Court was permitted under 28 USCA § 1292 (1) and (4) and the appeal had to be taken within 30 days of the entry of judgment.

CONCLUSION

This Court has jurisdiction of the appeal despite the failure of the decree appealed from to contain the certificate of the District Court required by Rule 54(b) because the decree is made appealable by statute—28 USCA § 1292(1) and (4). As to all three defendants Bergman, Perma-Lox, and Langville, it is an order granting an injunction (§ 1292(1)). As to defendant Langville, the decree is final except for an accounting (§ 1292(4)).

The Court is requested to vacate the dismissal of the appeal and to decide the case on its merits.

Respectfully submitted,

ROBERT F. MAGUIRE,
J. PIERRE KOLISCH,
Counsel for Petitioners.

I certify that in my judgment the foreging petition for rehearing is well founded and has not been interposed for delay.

J. Pierre Kolisch,
Counsel for Petitioners.